No. 78-1914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNIROYAL ENGLEBERT BELGIQUE, S.A.,
a Belgian corporation,
Appellant,

vs.

JOHN DARRELL CONNELLY,
Appellee.

On Appeal from the Supreme Court
of the State of Illinois

MOTION TO DISMISS OR AFFIRM

~~BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI~~

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Appellee John Darrill Connelly respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Illinois on the grounds that (1) the instant case is not within the scope of this Court's appellate jurisdiction, or, in the alternative, (2) the questions on which the decision of this case depends are not so substantial as to need further argument.

Treating Appellant's Jurisdictional Statement as a Petition for a Writ of Certiorari, Appellee John Darrill Connelly respectfully prays that the petition be denied.

I.

(A) GROUNDS ON WHICH JURISDICTION IS INVOKED

Appellant Uniroyal Englebert Belgique, S.A. (hereinafter called "UEB") contends that this Court has jurisdiction of this case by appeal under 28 U.S.C. § 1257 (2), which provides for review of state court judgments

> "By appeal, where is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity."

Here, UEB was subjected to the jurisdiction of the Illinois courts pursuant to § 17(1)(a) of the Illinois Civil Practice Act (Ill. Rev. Stat. c. 110, § 17(1)(a)), which provides that a defendant subjects itself to Illinois' jurisdiction by "the transaction of any business within this State," where the cause of action arises out of the transaction of that business. UEB's position here and below is that in holding that its acts constituted the "transaction of business" in Illinois, the court deprived UEB of due process of law because such acts did not constitute sufficient "minimum contacts" with Illinois under the standards of the *International Shoe* case and its progeny.

Thus, this case does *not* draw into question the validity of the Illinois long-arm statute, but merely draws into question whether the statute's application to UEB is violative of UEB's rights under the due process clause of the federal Constitution. This is not sufficient to confer jurisdiction under 28 U.S.C. § 1257(2). *Hanson* v. *Denckla,* 357 U.S. 235, 244 (1958); *Kulko* v. *Superior Court,* 436 U.S. 84, 90 (1978).

Therefore, the appeal should be dismissed.

(B) QUESTION PRESENTED

UEB's statement of the question presented is argumentative in form and not entirely accurate. The question is whether, on the undisputed facts, UEB has sufficient "minimum contacts" with Illinois to satisfy due process requirements for purposes of jurisdiction, when it places its products in the stream of commerce with knowledge that these products will come to rest and be used in Illinois, and the product in question in fact was sold in Illinois to an Illinois resident and its principal use was in this state, despite the fact that UEB had no direct contact with Illinois and plaintiff's injury occurred in Colorado.

(C) STATEMENT OF THE CASE

In its statement of the case, UEB states that it has not "shipped any products, either directly or indirectly, into Illinois." This is incorrect. UEB sold its tires, including the tire in question, to a subsidiary of General Motors with knowledge that a quantity of these tires would be installed on automobiles which would be exported to the United States, including Illinois. It would require an unrealistically narrow interpretation of this conduct to say that this is not the indirect shipment of products into Illinois.

UEB also states that we have "hypothesized" that several thousand tires manufactured by UEB "may" have been present in Illinois at relevant times. Actually, no one has yet disputed that during such times there was an average of approximately 4,000 UEB tires present in Illinois at any given time. Nor is it disputed that UEB was aware that its tires would be used in quantity in the United States, and therefore in the various states including Illinois.

(D) DECISION BELOW

UEB states that, prior to the decision in the instant case, jurisdiction over a nonresident for a cause of action in tort could be obtained only upon proof that defendant had committed a "tortious act" within the state of Illinois. As we demonstrated in our brief below, using cases both from Illinois and other jurisdictions, jurisdiction in a tort case may be sustained either under the "tortious act" or "transaction of any business" provisions of the Illinois long-arm statute. *Bolf* v. *Wise*, 119 Ill. App. 2d 203, 255 N.E.2d 511, 514 (1970); *Ziegler* v. *Houghton-Mifflin Co.*, 80 Ill. App. 2d 210, 224 N.E.2d 12 (1967); *Buckeye Boiler Co.* v. *Superior Court*, 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969).

UEB also suggests that the Illinois Supreme Court did not rest its decision on any particular provision of the Illinois long-arm statute, but instead merely sustained jurisdiction on due process grounds because UEB had "purposefully invoked the benefits and protections of the law of Illinois." Jurisdictional Statement, p. 8. However, it is clear from the opinion of the Illinois Supreme Court that it sustained jurisdiction under the "transaction of any business" provision of the statute. 389 N.E.2d at 158-161. Moreover, the court's analysis was clearly correct, whether or not it rested its decision on one portion of the statute or another, since the court has consistently interpreted the Illinois statute as extending jurisdiction to the full limits of due process. *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E.2d 673, 679 (1957); *Connelly* v. *Uniroyal, Inc.*, 75 Ill. 2d 393, 389 N.E.2d 155, 159 (1979).

(E) SUBSTANTIALITY OF THE FEDERAL QUESTION

UEB here states (Jurisdictional Statement, pp. 8-9):

> "As construed by Illinois' highest court, its long arm arm statute now enables Illinois to exercise jurisdiction over a non-resident whose sole contact with that state is the presence there of a product which the nonresident had manufactured and sold outside that state. Nothing else need be shown."

This is not a correct statement of the holding below. Rather, this case merely holds that when a nonresident manufacturer places his products in the stream of commerce, knowing that they probably will be purchased and used in Illinois by Illinois consumers in significant numbers (e.g., 4,000 tires present at a given time), the fundamental fairness concept of the due process clause is not violated when the manufacturer is required to defend an action in Illinois brought by an Illinois resident who was injured allegedly as a result of a defect in one of those products. Perhaps mere presence of the product in Illinois ordinarily would *not* be sufficient, but that was not the case here. We had, in addition, (1) purchase and use in Illinois by an Illinois resident, (2) injury to that Illinois resident, (3) the manufacturer's knowledge and expectation that his product would be purchased and used in Illinois in substantial quantities, and (4) actual presence in Illinois of some 4,000 units of his product having a value of many thousands of dollars.

Thus, neither the pendency in this Court of the *Rush* and *Woodson* cases nor the due process clause as interpreted by this and other courts present a sufficient basis to justify acceptance of the appeal or the granting of certiorari in the instant case. Under well-accepted authority, the decision below does not present a substantial federal question.

(i) The *Rush* and *Woodson* Cases

UEB argues that the issue involved in the instant case is just as significant as in the *Rush* and *Woodson* cases in which this Court has recently noted probable jurisdiction and granted certiorari, respectively. Those cases present much different and more difficult questions than were present here.

Savchuk v. *Rush,* 272 N.W.2d 888 (Minn. 1978), *prob. juris. noted,* ..... U.S. ....., 99 S.Ct. 1211 (1979), involves the assertion of jurisdiction by a Minnesota resident over an Indiana resident in Minnesota for injuries sustained in an accident which occurred in Indiana, solely by garnishment of defendant's insurance policy. Obviously, the decision in that case will have no bearing on this one. Qualitatively and quantitatively, defendant's contacts with the forum state are far less there than here. In addition, that case is a quasi-in-rem proceeding; here, we are dealing with jurisdiction over the person. The purchase of an insurance policy from a company which happens to be doing business in another state is an entirely different act than the placing of one's product in the stream of commerce in contemplation of its use, and the impact of its defect, in the forum jurisdiction.

World-Wide Volkswagen Corp. v. *Woodson,* 585 P.2d 351 (Okl. 1978), *cert. granted,* ..... U.S. ....., 99 S.Ct. 1212 (1979), does not involve a product manufacturer who places his product in the stream of commerce for ultimate sale in the forum state. Moreover, defendants there, the New York area wholesaler and retailer of the auto in question, engaged in no commercial activity in contemplation of Oklahoma "business." A local dealer is in a far different position than a manufacturer who knows and expects that

his product will receive world-wide distribution, and will certainly be purchased in the forum state.

Thus, this Court could rule in favor of defendants in both *Rush* and *Woodson* without in any way undermining the decision of the courts below in the instant case.

(ii) The Due Process Requirement

UEB next argues that the decision of the Illinois Supreme Court below is in violation of the due process standards established by this Court in the *International Shoe, Hanson, Shaffer* and *Kulko* cases. This very issue was fully argued below, and as we demonstrated there, UEB's argument is simply based on a misreading of the applicable law.

International Shoe Co. v. *Washington,* 326 U.S. 310 (1945), was not a product liability case, and thus its facts have little bearing on the instant case. Rather, the importance of *International Shoe* is the *standards* it established. As consistently interpreted by all state and federal courts, *International Shoe* stands for the proposition that in order to subject a nonresident defendant to long-arm jurisdiction, that defendant must have some "minimum contacts" with the forum state, such that requiring it to defend itself there does not offend "traditional notions of fair play and substantial justice." 326 U.S. at 316. The relevant inquiry is whether defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum. 326 U.S. at 319; *Hanson* v. *Denckla,* 357 U.S. 235, 253 (1958). Although, as the Illinois Supreme Court below recognized, these standards have not been uniformly interpreted and applied in the various state and federal courts, the clear

preponderance of judicial thought in products liability cases has been that a product manufacturer has "invoked the benefits and protections of the law of the forum" when it places its product in the stream of interstate commerce with the knowledge or expectation that the product will likely come to rest in the forum state, and therefore will be purchased and used and have an impact upon citizens of that state. *E.g., Gray* v. *American Radiator & Standard Sanitary Corp.,* 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *Keckler* v. *Brookwood Country Club,* 248 F. Supp. 645 (N.D. Ill. 1965); *Buckeye Boiler Co.* v. *Superior Court,* 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1969); *Duple Motor Bodies, Ltd.* v. *Hollingsworth,* 417 F.2d 231 (9th Cir. 1969); *Omstead* v. *Brader Heaters, Inc.,* 5 Wash. App. 258, 487 P.2d 234 (1971), *aff'd,* 80 Wash. 2d 720, 497 P.2d 1310 (1972); *Gullett* v. *Qantas Airways Ltd.,* 417 F. Supp. 490 (M.D. Tenn. 1975); *Dotterweich* v. *Yamaha International Corp.,* 416 F. Supp. 542 (D. Minn. 1976); *Hardy* v. *Pioneer Parachute Co.,* 531 F.2d 193 (4th Cir. 1976). And while the foreseeable presence of a single product in the forum state may be sufficient, it is abundantly clear that there are sufficient "minimum contacts" when the presence of defendant's product is not an isolated instance, but is part of a volume of business in the forum state from which the manufacturer has profited. See cases cited above.

Thus, the purposeful act requirement of *Hanson,* which UEB so strongly emphasizes, is almost uniformly held to have been met by the manufacturer's conduct in placing his product in the stream of interstate commerce under circumstances in which he can foresee its presence and use in the forum state. That is exactly the situation here.

The vitality of the *International Shoe* standard was recently affirmed by this Court in *Shaffer* v. *Heitner,* 433 U.S. 186 (1977), which extended the "minimum contacts" requirement to cases involving in rem jurisdiction. *Shaffer* is simply inapplicable here, since the courts below clearly applied the minimum contacts test in a manner consistent with the established due process limitations. UEB argues that *Shaffer* supports its position, but this argument is based upon an incorrect reading of the *Shaffer* opinion. UEB cites *Shaffer* for the proposition that the "mere presence" of defendant's property in the forum state is not a sufficient contact for due process purposes. But that is not what *Shaffer* holds. As the majority opinion states, and the concurring and dissenting opinions make clear, the case holds only that the mere presence of defendant's property in the state is not sufficient *where that property is unrelated to the cause of action being litigated.* The principal reason for this is that a defendant could not fairly expect that the mere ownership of stock in a Delaware corporation would subject him to the burden of litigating in Delaware on matters unrelated to the title to that property. But as the majority opinion recognizes,

> "This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be *unusual* for the State where the property is located *not* to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest." 433 U.S. at 207-08 (emphasis added).

Thus, neither explicitly nor implicitly did the Court in *Shaffer* in any way limit or impair the validity of cases such as *Gray* and its progeny. What was missing in *Shaffer,* but is present in cases such as *Gray* and the instant case, is (1) a *nexus* between the property, the defendant, the forum state, and the cause of action, and (2) *foreseeability* by the defendant that his property may be the subject or cause of litigation in the forum state. The cases cited above, among others, clearly establish that a defendant has invoked the benefits and protections of the law of the forum state when it is reasonably foreseeable that his activities may cause consequences in that state, and that he may be sued there. Therefore, UEB's reliance on *Hanson* v. *Denckla* is also misplaced. Moreover, *Hanson* and *Shaffer* are trust and corporate cases; this is a personal injury-product liability case. Very different considerations apply when the case involves the placing of potentially dangerous products into national and international streams of commerce.

In *Kulko* v. *Superior Court,* 436 U.S. 84 (1978), this Court, in overturning California's assertion of jurisdiction over a New York father in a child support case, was careful to point out that this was not a commercial case, that the father received no financial benefit from his child's presence in California, and that the "mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain nor expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction." 436 U.S. at 101. The opinion makes clear that the existence of such a commercial benefit would make a different case.

Gray v. *American Radiator & Standard Sanitary Corp.,* 22 Ill. 2d 432, 176 N.E.2d 761 (1961), of which the instant case is but a direct application, is now eighteen years old. As will be seen from the foregoing authorities, as well as the many others which have cited and relied upon it, *Gray* has become the leading case in the United States on jurisdiction over a non-resident defendant in a product liability case. Unlike other long-arm jurisdiction cases which this Court has accepted for review in recent years, the instant case is squarely within the well-established body of precedent consisting of *Gray* and its progeny. Moreover, *Gray* and its progeny, including the instant case, are well within the due process limitations established by this Court in *International Shoe* and the line of cases following it. Therefore, the instant case presents no substantial constitutional question. There is no need to expend the precious time and resources of this Court merely to approve the well-established application of the principles of *International Shoe* to product liability cases such as the instant one.

(iii) Relation To Other Cases

Finally, UEB asserts that the instant case is unique in holding that due process requirements are met on these facts. As we have shown in the preceding section, this assertion is not correct. UEB's argument that the mere presence in the forum state of its product is insufficient to support jurisdiction is irrelevant, since this case is not that situation. This case involves the purposeful act of placing defendant's product in the stream of international commerce under circumstances where it is foreseeable that the product will be sold and used in Illinois in significant quantities, plus the actual purchase and use of the product in Illinois by an Illinois resident with the resulting in-

jury to that resident, plus the actual presence in Illinois of a substantial volume of UEB's product pursuant to its marketing scheme.

The few cases cited by UEB (Jurisdictional Statement, p. 16, nn. *, **) generally involve more restrictive long-arm statutes than that of Illinois, or more restrictive constructions of the particular long-arm statute than is constitutionally required.

Let us examine the three cases upon which UEB principally relies. With respect to *Fisons Ltd.* v. *United States,* 458 F.2d 1241 (7th Cir. 1972), *cert. denied,* 405 U.S. 1041 (1972), the statement in the opinion that jurisdiction would not be present if the English manufacturers were simply manufacturers whose products are resold in the forum was, of course, dictum, since the court found jurisdiction. Second, that statement may be literally true, but as we have shown that is not the case here. Third, the statement is of doubtful value, since the court there applied standards from an Illinois case (*Grobark*) which, it is generally agreed, did not survive the *Gray* decision.

Hutson v. *Fehr Bros., Inc.,* 584 F.2d 833 (8th Cir. 1978), *cert. denied,* ..... U.S. ....., 99 S.Ct. 573, a 4-3 decision, involved a defendant who was not the product's manufacturer. More importantly, the court there found that the defendant had no reason to contemplate that its product would be resold in the forum state, and the decision turned on that fact. Even so, Judge Lay, dissenting, was able to state that "I am aware of no other federal or state decision which is in accord with the restrictive holding set out today." 584 F.2d at 840.

As to *Hapner* v. *Rolf Brauchli, Inc.,* 400 Mich. 160, 273 N.W.2d 822 (1978), we do not read that decision the same

as does UEB. The Michigan Supreme Court was badly divided, but it appears that five of the seven judges either found jurisdiction to exist or voted to remand the case for further proceedings to allow plaintiff to establish additional jurisdictional facts. Again, to the extent that some of the judges found an insufficient basis for jurisdiction, it was because they concluded that the product manufacturer had no reason to know that his product would be distributed or sold in Michigan. The opposite is true in the instant case.

UEB suggests that this Court, in effect, retreat to the days of *Pennoyer* v. *Neff,* when territorial limitations on the power of the states were rigidly observed and physical presence, or at least direct activity, of the defendant in the forum state was required. UEB would have this Court ignore the growth of long-arm jurisdiction which has taken place in this country since *International Shoe,* which has clearly established that the minimum contacts required may be as indirect as they are here, in keeping with the realities of the modern marketplace.

In addition, UEB would have this Court contract the jurisdiction of state courts, despite the fact that the weight of responsible opinion is that state courts should have the predominant role in litigation of this type and the role of federal courts should be restricted. Inevitably, the rule for which UEB argues would have the opposite effect.

II.

CONCLUSION

Wherefore, Appellee John Darrill Connelly respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and

also that this cause is not within the appellate jurisdiction of this Court, and therefore respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the Illinois Supreme Court.

In the alternative, treating Appellant's Jurisdictional Statement as a Petition for a Writ of Certiorari, the Petition presents no substantial federal question, and therefore Appellee respectfully prays that the Petition be denied.

Respectfully submitted,

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